

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE #5 (“Union”),**

-and-

CITY OF PHILADELPHIA (“City” or “Employer”)

OPINION and FINAL AWARD

**AAA Case No. 01-15-0003-0329
(Consolidated)**

Grievant: P/O Sean J. McKnight ()
Grievant: P/O Kevin A. Robinson ().

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BEFORE: Robert A. Grey, Esq., Impartial Arbitrator

HEARING DATE: October 25 and December 7, 2016 at American Arbitration
Association, 230 South Broad Street, Philadelphia, PA 19102

APPEARANCES:

FOR THE UNION:

Jennings Sigmond, P.C.

By: Marc L. Gelman, Esq., Shareholder

FOR THE EMPLOYER:

City of Philadelphia Law Department, Labor and Employment Unit

By: Frank E. Wehr II, Esq., Assistant City Solicitor

INTRODUCTION

The Philadelphia Police Department (“PPD”) found both Grievants guilty of three (3) violations of the Department’s Disciplinary Code (“Code”) in connection with an on-duty arrest (“incident”) which occurred on May 29, 2013. The disciplinary penalty imposed upon both Grievants was dismissal. The Union seeks Grievants’ reinstatement, with a make-whole remedy. The City seeks denial of the grievance.

STIPULATED ISSUES

Did the City have just cause to dismiss Grievants Sean J. McKnight and Kevin A. Robinson?

If not, what shall be the remedy?

BACKGROUND

Pursuant to the parties' Collective Bargaining Agreement ("CBA"), arbitration hearings of this matter were held October 25 and December 7, 2016. Both parties appeared by counsel and were afforded full, fair and ample opportunity to present and challenge evidence, examine and cross-examine witnesses, and argue their positions. Neither party questioned the fairness of the proceedings.

All testimony was given under oath or affirmation and direct observation of this Arbitrator. All testimony, exhibits and party positions have been considered, whether or not specifically addressed herein. This Opinion and Final Award is based upon the entire record, including my assessment of witness credibility, conflicting testimony, and the relative probative value of all evidence in the record. The proceedings were not recorded; no transcript was produced. No procedural challenges having been raised, the grievance is arbitrable.

The following facts are not materially in dispute, unless noted otherwise. They are presented in chronological order:

On September 10, 2008 Grievant Police Officer Sean J. McKnight ("McKnight") was appointed as a PPD Police Officer. He was assigned to the 25th District on March 25, 2010.

On November 17, 2008 Grievant Police Officer Kevin A. Robinson (“Robinson”) was appointed as a PPD Police Officer. He was assigned to the 25th District on November 23, 2009.

For all relevant purposes, both Grievants remained continually assigned to the 25th District from the above assignment dates until being placed on restricted duty at headquarters in July of 2013, as a result of the May 29, 2013 incident.

On May 29, 2013, while on-duty, Grievants arrested Mr. N [REDACTED] R [REDACTED] (“R [REDACTED]”). Grievants are charged with “unauthorized and/or excessive use of force in [their] official capacity” during the incident, and with “knowingly and willfully making a false entry in any Departmental record or report” about the incident. The incident will be discussed more fully below.

On July 3, 2013 a Philadelphia Assistant District Attorney (“ADA”) informed PPD Internal Affairs (“IA”) that the offices of the District Attorney (“DA”) had come into possession of a video of the May 29, 2013 incident. It is undisputed that neither Grievants nor the parties had prior knowledge that any video of the incident existed. Additionally, according to the ADA, the video appeared to conflict with the Grievants’ statements about the incident. As a result, the DA’s office withdrew the May 29, 2013 arrest charges against Rivera, and referred the matter to PPD IA.

Also on July 3, 2013 PPD IA immediately commenced an investigation, and Grievants were placed on restricted duty. While on restricted duty Grievants continued to be paid, were relieved of their firearms, were assigned to answering phones at headquarters, and occasionally testified in court regarding unrelated prior arrests.

Grievants remained on restricted duty until February 5, 2015 (see below).

On February 2, 2015 an ADA informed PPD IA that a Grand Jury recommended criminal charges against both Grievants regarding the May 29, 2013 incident.

On February 4, 2015 IA filed criminal complaints against both Grievants in the Commonwealth Court of Common Pleas, Philadelphia County, regarding the May 29, 2013 incident. Each was charged with Criminal Conspiracy (F1); Aggravated Assault (F1); Simple Assault (M2); Recklessly Endangering Another Person (M2); Tampering with Public Records or Information (F3); False Reports to Law Enforcement Authorities (M2); Obstructing Administration of Law (M2); and Official Oppression (M2), all charged under Pennsylvania Statutes Title 18, Crimes and Offenses. City Exhibits 14 and 15.

On February 5, 2015 Grievants were each given Criminal Gniotek Warnings. Each was offered the opportunity to respond; each declined to do so. Grievants were both suspended for thirty (30) days with the Intent to Dismiss, effective immediately. Grievants were placed under arrest pursuant to arrest warrants obtained by IA. City Exhibits 8, 14 and 15.

On February 11, 2015 then-PPD Commissioner Ramsey, by Commissioner's Direct Action ("CDA") carried under PBI #15-0089 (no Police Board of Inquiry hearing held because it was CDA), determined that both Grievants should be dismissed from their PPD employment for Conduct Unbecoming, under Code sections 1-§010-10, 1-§012-10 and 1-§026-10, regarding the May 29, 2013 incident. Joint Exhibits 2, 3, 4 and 5.

On February 25, 2015 Robinson was served with Notice of Intention to Dismiss, effective 10 days therefrom. Joint Exhibit 4. On February 26, 2015 McKnight was served with Notice of Intention to Dismiss, effective 10 days therefrom. Joint Exhibit 3. The Notices of Intention to Dismiss contained the specific charges against each officer, drawn-up by the PPD Charging Unit.

On March 3, 2015 the IA Commanding Officer reviewed and approved the IA investigation memorandum report to the Police Commissioner, carried under IAD #13-1092, which concluded Grievants used excessive force during the incident, and falsified police records or reports about the incident. City Exhibit 8.

On March 8, 2015 Grievants were each served with Notice of Dismissal, effective March 7, 2015. Joint Exhibits 3 and 4. The Notices of Dismissal contained the same specific charges contained in the Notices of Intention to Dismiss.

On March 26, 2015 the Union filed demands for arbitration pursuant to the CBA, claiming discharge without just cause. A separate demand was filed for each Grievant.

On or about April 16, 2015 the undersigned neutral was selected by the parties for the McKnight grievance, under AAA Case No. 01-15-0003-0329.

On April 21, 2015, upon mutual agreement of the parties, the American Arbitration Association (“AAA”) issued a Notice of Hearing for the McKnight arbitration, to be held on August 21, 2015.

On July 30, 2015 the parties notified AAA of their agreement to hold the arbitration in abeyance because the criminal charges against McKnight were still pending.

On April 11, 2016, after trial by jury in the Commonwealth Court of Common Pleas, Philadelphia County, at which Grievants testified as defendants, both were found Not Guilty of all charges (the charge of Recklessly Endangering Another Person was *Nolle Prossed*).

On July 14, 2016, upon mutual agreement of the parties, AAA consolidated the separate grievances for McKnight and Robinson into one grievance, under AAA Case No. 01-15-0003-0329, and closed-out AAA Case No. 01-15-0003-0330. Also on July 14, 2016, AAA issued a Notice of Hearing for the consolidated McKnight and Robinson grievance, to be held on October 25, 2016. The arbitration hearing took place on October 25 and December 7, 2016.

On December 23, 2016 the undersigned issued an Interim Award in this matter. The Interim Award held that “The City did not have just cause to dismiss Grievants Sean J. McKnight and Kevin A. Robinson. Grievants are reinstated to their positions of employment with the City, subject to normal pre-hiring conditions. Appropriate remedy, including back pay, if any, will be contained in the Opinion and Final Award.” This document is the Opinion and Final Award referred to in the Interim Award.

RELEVANT AUTHORITY

Philadelphia Police Department Disciplinary Code (Joint Exhibits 1 and 5):

Article I, Conduct Unbecoming:

1-§010-10: Knowingly and willfully making a false entry in any Departmental record or report.

* * *

1-§012-10: Unauthorized and/or excessive use

of force in your official capacity.

* * *

1-§026-10: Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

The Code provides the following collectively negotiated penalty schedule for the above violations:

<u>Section</u>	<u>1st Offense</u>	<u>2nd Offense</u>	<u>3rd Offense</u>	<u>Reckoning Period</u>
1-§010-10	5 days to <u>Dismissal</u>	15 days to Dismissal	Dismissal	5 Years
1-§012-10	Reprimand to <u>Dismissal</u>	Reprimand to Dismissal	Reprimand to Dismissal	5 Years
1-§026-10	30 days or <u>Dismissal</u>	Dismissal	[n/a]	Duration of Employment

[Underlining and **bold** added to denote the penalties imposed upon Grievants by the Police Commissioner's Direct Action.]

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POSITIONS OF THE PARTIES

The positions of the parties are drawn from their respective opening and closing statements, *verbatim*, or nearly so. To designate that the source of these positions are the parties rather than the Arbitrator, the party positions are set in single-spaced *italics*.

City Position

The City dismissed Grievants for three (3) independent Code violations, each of which on its own provides just cause for dismissal, even for a 1st Offense: 1-§010-10 Knowingly and willfully making a false entry in any Departmental record or report; 1-§012-10 Unauthorized and/or excessive use of force in your official capacity; and 1-§026-10 Engaging in any action that constitutes the commission of a felony or a misdemeanor [for which] [n]either a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

If Grievants did not use excessive force, but were dishonest in their reports, the City has just cause to dismiss. If Grievants did use excessive force, but were not dishonest in their reports, the City has just cause to dismiss. Lack of criminal conviction is the not same as no just cause.

A police department's relationship with a District Attorney's ("DA") office is the bedrock of a criminal justice system. Breakdown of trust between PPD and the DA has effects far beyond this case. The "big picture" in this case is about the entire Philadelphia criminal justice system. Grievants failed to uphold their responsibilities to this system.

PPD Police Commissioner Ross, who was a PPD Deputy Chief at the time Grievants were dismissed, made it abundantly clear to this tribunal that in the functioning of PPD, and in PPD's interaction with the DA's office, the credibility of PPD officers is critical. Commissioner Ross made it clear that he personally, and as Police Commissioner, and the PPD as a whole, take these charges very seriously, and stand 100% behind the decision to dismiss these Grievants.

This case is not about equal treatment, lack of notice, or fairness of investigation. It is not about whether the penalties are appropriate to the rules violated, because the parties negotiated the penalties. Rather, this case is about proof. No doubt that being a police officer in Philadelphia is a hard and thankless job, and this incident occurred in a hard, rough and dangerous neighborhood. But even so, it is of the utmost importance that police officers follow the rules governing how they can act in performance of their duties. Only necessary force can be used, and reporting must be completely forthright.

The following is proof of just cause in this case: No mention by Grievants to Det. Brooks of ramming or roadblocking the scooter with the RPC, even though same can be seen in the video. Grievants did not merely “observe [R████] lose control of the scooter and fall to the ground.” Former ADA H████ was shocked by the video, and testified about comments made by Grievants in her presence. It is of major significance that she felt the video meant she could no longer proceed with criminal charges against R████, because she could not fully trust what Grievants told her, nor what they had written in their reports. Additionally, she felt compelled to have the matter pursued by PPD IA. Even if there were no clear lies, Grievants were dishonest through omission: they mis-described R████ as the aggressor, recommending he be charged with assaulting police even though Grievants had no injuries, while R████ arrest photos show significant injuries.

It is very surprising that both Grievants used the same vague “observed [R████] lose control of the scooter and fall to the ground” language regarding a fast and violent crash. The video shows the closeness of the RPC to the scooter. It shows the RPC pinching the scooter against the curb, causing the scooter to crash. Grievants left out of their reports any mention of the closeness of the RPC to the scooter and the scooter to the curb. Robinson’s testimony on this was evasive, and McKnight’s testimony of trying to reach out of the RPC window to grab R████ on the scooter does not appear in the reports. This speaks volumes about why the scooter crashed. We are forced to speculate why Grievants documented everything else they attempted to do, but left this information out of their reports.

Grievants’ claims that arrest reports are not supposed to be fully descriptive does not explain the inaccuracies of their reports regarding R████ allegedly running 15 to 20 feet, nor the misstated time elements of the incident. Even if Grievants were truthful in their reports, what they did with the RPC was excessive force, both the vehicle-to-vehicle contact, and grabbing or attempting to grab Rivera from the RPC while both vehicles were moving.

The Union called retired Sgt. Ebner as an expert witness on use of force. However, Sgt. Ebner testified that in the 25 to 30 times he was called to testify for the City in court [on cases unrelated to this grievance], he never found that police used excessive force. Therefore, his testimony should be given little weight, especially because no one can really make out what can be seen in the video.

McKnight testified he was “never so sure anyone had a gun” when R████ reached to his [R████] waist during the struggle, but it is undisputed R████ turned out not to have a gun. Lt. H████ information heightened the incident with respect to state of mind of the Grievants, but does not change the facts of what Grievants did with the RPC and did not write in their reports. Robinson’s testimony that he did not put on the RPC’s lights because the incident began in a split second is somewhat understandable, but is also cause for concern with respect to public safety, especially in light of Lt. H████ testimony that it is a given to put on lights and siren when pulling over vehicles.

“Just cause” is not “beyond a reasonable doubt”. Grievants were acquitted at criminal trial without the testimony of Mr. R [REDACTED] or ADA H [REDACTED]. Criminal convictions require proof beyond a reasonable doubt, but the City does not have to prove Grievants’ culpability to these disciplinary charges beyond a reasonable doubt to prove there was just cause to dismiss them. The City proved it had just cause to find Grievants violated Code Sections 1-§010-10, 1-§012-10 and 1-§026-10. The City also had just cause to believe Grievants violated Code Sections 1-§010-10, 1-§012-10 and 1-§026-10. The penalty of Dismissal is authorized by the collectively-bargained Code for each of these violations, even for a 1st Offense for any one (1) of them. Even if Grievants did not commit a crime, the City had just cause to dismiss them under 1-§010-10 and 1-§012-10.

The Grand Jury, IA and the Police Commissioner share the same view of Grievants’ conduct. This means the punishment fits the crime, and their dismissals should be upheld. It is a hard time to be a police officer, but it is also a hard time to run a police department. PPD cannot effectuate criminal justice without public trust, and without a relationship of trust and honest communication between PPD officers and the DA.

Grievants should not be reinstated, but if they are, they should be required to meet all usual pre-hiring conditions. If reinstated, there should not be any back pay at all due to the serious nature of these charges, the publicity and public perception of police brutality from the video, its reflection on the Department with the public and with the District Attorney, and the fact that Grievants were criminally charged upon Grand Jury recommendation after a thorough investigation. Prior to the criminal charges, while under investigation for such a serious incident as portrayed in the video, Grievants could not serve in the full capacity for which they were hired as Police Officers. Despite these factors, the City made an accommodation it was not required to make by placing Grievants on restricted duty. Once Grievants were criminally charged (and arrested), Grievants could not function at all as Police Officers, and therefore the City had no obligation to continue to employ and pay them in any status during the pendency of the criminal charges. Therefore, if back pay is awarded, there should be no back pay for the time between the date of the criminal charges against Grievants, and their acquittal on same.

Additionally, settlement of the civil lawsuit triggered by the video cost the City a \$200,000 settlement. A video like this means such a lawsuit has to be settled, because with the wrong jury it could cost the City a lot more than \$200,000 in damages.

The City urges that the grievance be denied in all respects.

Union Position

The Union does not dispute the facts, but does dispute the inferences and implications the City tries to draw from them. Grievants were properly performing their jobs. The City engaged in Monday morning quarterbacking, without objectively considering all the evidence.

Grievants are in a very unique situation, because they are the victims of circumstances, perception, public policy concerns, interdepartmental wheeling and dealing, and the system. From the date the video was revealed, Grievants have been the City's punching bags, without a chance to level the playing field and tell their story until this arbitration. The City was afraid of the video and the publicity it received, overreacted, and threw Grievants under the bus.

The unique thing about this case is the delayed discovery of the existence of video. Had there been no video, or had the video been found within a short period of time after the incident happened, this would have been a run of the mill incident on the mean streets of the busy, dangerous, high crime volume North Philadelphia 25th District. Even by the City's standards, this was a normal vehicle stop. R█████ was pulled over for running a stop sign. He fled. Grievants didn't pursue, but found him a few minutes later. He fled again, but crashed his scooter while doing so. After the crash he tried to flee yet again, but Grievants caught him. He violently resisted. Grievants had to subdue him to gain control and handcuff him.

R█████ had Robinson by lapels. McKnight, fearing Robinson was in danger, based upon what he saw of R█████ that evening, and based upon his training and experience in the 25th District, attempted to assist Robinson. McKnight tried to separate a potentially armed suspect from his partner. Eventually R█████ was brought to the ground, but still violently refused to comply.

Grievants' conduct was reasonable at the time and place of occurrence, unlike the City's Monday morning quarterbacking conclusions. The City is looking back in hindsight with rose colored glasses.

The City makes a big deal about R█████ screaming during the incident. But the audio is our best friend, because one can clearly hear McKnight, and somewhat Robinson, repeatedly directing R█████ to comply. But R█████ fails to comply. Robinson got one of R█████ hands in cuffs, but the other was still free. R█████ used his free hand to grab McKnight and strike his Asp to the ground, collapsing it. R█████ then reached with his free right hand under him to reach his waistband area. The assumption is he had a weapon there. McKnight then struck R█████ in the face with the closed Asp in his hand. He would have used whatever he could get in his hand to strike R█████ to prevent him accessing his waistband, and to gain control. McKnight had every reason to believe R█████ was reaching for a gun, and therefore had right the right to hit R█████ in the face with the closed Asp. Even Lt. Sandusky agreed. R█████ did not have a weapon, it turns out. But the assumption that he did was valid.

For at least 24 hours, no one knew there was a video of the incident. There were no known witnesses. To the extent Grievants would knowingly lie or deceive, they had a blank check to say whatever they wanted. R█████ was bleeding and harmed. Grievants, if they believed they had a problem, and being smart individuals, could have done or said anything.

But Grievants immediately called for a supervisor. It was 10 minutes before anyone else arrived on scene. When Sgt. S [REDACTED] arrived on scene, Grievants told him McKnight used a closed Asp to strike R [REDACTED] face. Tasers and guns show actual evidence of use, but Asps do not. Grievants could have not said an Asp was used, and no one would have known. Grievants told the same to Det. Brooks. Grievants told Sgt. S [REDACTED] and Det. Brooks that R [REDACTED] was using elbows. They downplayed it, when they could have embellished, blown it up bigger, and no one would have known. Remember, Grievants did not know there was a camera.

Grievants did not falsify any documents. They crossed every T, dotted every I, and followed all protocols. They honestly reported their subjective beliefs at the time.

The Use of Force report is a summary report, not a detailed report for a defense attorney to use against officers in criminal court. Grievants wrote that the Asp was used.

There is no evidence Grievants knowingly and wilfully made any false statements on their paperwork. There are no doctored entries. They provided descriptions of what happened on paper and to Det. Brooks. Police reports are summary, not a thesis. Grievants' written reports and their statements to Det. Brooks are consistent not different, and entirely justified under Department rules. Grievants honestly reported their perceptions. That is not lying. There is no just cause for knowingly and wilfully made any false entries in Department records or reports.

There is no just cause for unauthorized or excessive use of force. The City is wrong. The force used was not excessive under the circumstances, and was in compliance with the force continuum. City's entire case is "look at the video".

If Grievants are not found in violation of the force and falsification charges, they cannot be guilty of the third charge. For the catch-all third charge, the Arbitrator would have to find Grievants committed the crimes they were charged with and acquitted of.

The controlling documents (other than the CBA) are Joint Exhibits 3 and 4: Grievants' Notices of Dismissal. They contain the only three (3) charges before this Arbitrator: false reports; use of force; and acts constituting a crime. That's it. These three (3) charges, nothing else. If City charged wrong, the City is stuck with what it charged.

If the Arbitrator finds excessive force, he can inquire if it rises to the level of a misdemeanor. But if excessive force is not found, there is no basis to find Grievants committed acts constituting any crime.

The City's argument regarding the DA - PPD relationship is completely irrelevant and has no bearing on this case. The Arbitrator should consider the facts, without any unnecessary context or politics. They have nothing to do with just cause. It means nothing in

this arbitration.

The Union is deeply disturbed by the DA's "setup" of Grievants. What ADA H [REDACTED] did is unforgivable. She violated Grievants' rights, used false pretenses, and abused the subpoena process. She committed prosecutorial misconduct.

On cross-examination she admitted she knew before the meeting took place that there was a good chance she would be "reporting it up" to her supervisors. This was a full change from her direct testimony.

The City's attorney in this arbitration has fully clean hands, but not so ADA H [REDACTED] and the DA's office. H [REDACTED] "memo to file" was suppressed by trial court Judge. The City was caught red-handed trying to redact the false pretenses and setup of the Grievants from the memo.

ADA H [REDACTED] testimony about Grievants' alleged reaction to learning a video existed is not relevant to this case, bearing in mind Grievants did not know a video existed. Even if her testimony is credited, if the City is trying to Grievants looked or acted nervous, this speaks volumes that "That's all they've got?!?" This shows the City has a weak case. H [REDACTED] testimony shows she had a pre-determined result regarding Grievants. The criminal charges against Grievants did not stick, and H [REDACTED] testimony is suspect.

Unlike H [REDACTED], Det. Brook's testimony was candid and honest. He took Grievants' statements and had no concerns with them. He testified about tunnel vision and warped time/space reality during violent incidents such as this.

Lt. Sandusky's testimony was also honest, but it hurt the City's case, terminally. Watching the video with start/stop and slow-motion during his testimony, he basically agreed there was no evidence of unauthorized or excessive force, that R [REDACTED] was likely trying to flee after the crash, that cannot conclude from the video who was controlling who, that the closed Asp strike to R [REDACTED] face was justified under Directive 7 (PPD Asp Directive) if R [REDACTED] was reaching to his waistband, and that the prior Asp strikes were also within PPD Directives and policies, and did not deviate from the force continuum. Lt. Sandusky acknowledged he is baton trained but not Asp trained, and that the newer Asp policy, put in by the Union, rather than the older baton policy, put in by the City, is applicable to this incident.

Lt. Sandusky testified all his use of force conclusions came from watching video, not from expertise. He worked in 6th District his whole career very different than the 25th District. He brought no use of force facts to the table. The City did not present testimony from a use of force expert or quasi expert. Sgt. E [REDACTED] testimony is the only objective evidence on use of force in the record.

Regarding Robinson's alleged use of the RPC to cause R█ to crash, versus McKnight's grabbing for R█ allegedly causing R█ to crash, the City can't have it both ways. The video does not show what happened. The video's noise is not determinative. The direction in which the scooter fell is not determinative.

The City's entire case is: "Mr. Arbitrator, here is the video." Therefore, the City's case on use of force lives or dies on the Arbitrator's impression of the video. The City did not meet its burden on force. Period.

There is no evidence there was a pursuit. Even Lt. Sandusky said so. Regardless, no one was charged with violating the Disciplinary Code provision pertaining to pursuits.

Lt. Sandusky testified Robinson "lied" because he did not give enough detail for regarding the scooter crash, "created the impression of a lie". Who cares about impression?! It takes more than "impression" to sustain a false statement charge. Lt. Sandusky testified McKnight "lied" because the statement "observed [R█] lose control of the scooter and fall to the ground" lacked candor. But that is exactly what happened. It is not a lie, even if not good enough for Lt. Sandusky. Both Det. Brooks and Lt. Sandusky testified there are no rules or policies on how much detail to put in reports or statements.

The charges that Grievants made false statements/entries about how many feet they ran to get to R█, or that it took about a minute to get R█ to the ground are laughable. Even Lt. Sandusky agreed perceptions can vary when in a physical struggle. There is no evidence either Grievant put a foot on R█ back or neck. An NFL referee can always find offensive holding on any play in a professional football game. That is what the City is trying to do to Grievants regarding this violent incident.

Grievants did not decide the charges against R█ that is beyond their control. They just reported what happened. Others in PPD and the DA's office decided the criminal charges to be filed against R█. Lot of moving parts decided what charges brought against R█, not Grievants.

Settlement of R█ civil case is irrelevant. The standard for indemnification is within scope of employment. The City did not withhold indemnification, even though based on their view of this incident they easily could have.

The City's case conflated Robinson and McKnight. The City was obligated to prove specific charges against Grievants individually, not collectively. The City failed to do so.

The City has a heightened burden of proof, higher than preponderance of the evidence, when it alleges criminal or quasi-criminal conduct, as it did against these Grievants. Some arbitrators say proof beyond a reasonable doubt is required. At the very least, clear and convincing evidence is required. The City has not met any of these degrees of

burden of proof.

The City failed to meet any burden of proof that excess force was used. The City failed to meet any burden of proof that Grievants knowingly and willfully made false entries. The City did not prove any mens rea. The City failed to prove Grievants' conduct amounted to the commission of crime. Therefore, there is no just cause. If the Arbitrator determines there is any just cause, termination is not warranted. The Code's penalty range for these charges is much less than dismissal. Arbitrators have broad discretion.

The Union disagrees with the City's pre-acquittal versus post-acquittal backpay arguments. It is not accurate to say Grievants could not serve as Police Officers while the criminal charges were pending. The City could have continued Grievants on restricted or limited duty during that time. The City made that gamble and has to live with it.

Grievants should be reinstated with a make-whole remedy, including full back pay and emoluments, and no loss of seniority. This discipline should be expunged from their records. The Arbitrator should retain jurisdiction for a brief period of time.

The Union urges that the grievance be sustained in all respects.

DISCUSSION AND OPINION

The weight of the credible and probative evidence establishes that the City met its burden to prove that discipline is warranted for each Grievant, but not to the extent necessary to uphold dismissal of either Grievant from his employment as a PPD Police Officer. This determination is based upon detailed and thorough review of the entire record, extensive deliberations, including many painstaking reviews of the video, in real time, slow motion, stop/start, rewind, etc., and careful consideration of the parties' respective positions and arguments.

The parties agree the video in evidence is of poor quality, being dark and grainy, making it difficult to see exactly what is happening. Other than the events allegedly depicted, or not depicted, in the video, most of the underlying facts are not materially in dispute.

The PPD Regional Operations Command East Division is comprised of the 24th, 25th and 26th Districts, located in North Philadelphia. The 25th District is comprised, in part, of the West Kensington and Fairhill neighborhoods. The 25th District is considered one of the two worst police Districts in the City of Philadelphia in terms of crime in general, violent crime, gun crime and illegal narcotics trafficking. There are typically more than 130,000 founded calls for police intervention per year, and at least twice as many unfounded calls per year.

At all relevant times the East Division was, and continues to be, beset with a serious crime problem consisting of motorized scooters (“scooters”), mopeds,¹ ATVs and motorized dirt bikes being used by criminals to lawlessly take over streets, possess, transport and sell illegal narcotics, illegally possess concealed firearms, commit other crimes, including violent crimes, and to avoid apprehension by police while doing so, or while fleeing from the scene thereof. These criminals are known to frequently be armed with unlicensed concealed firearms. They are frequently not licensed to operate these motor vehicles. These motor vehicles are frequently stolen and/or unregistered/uninspected. They are often driven illegally in and out of traffic recklessly, endangering other motorists and pedestrians, and causing accidents. This criminal activity was, and continues to be, both a serious crime problem and serious quality of life problem in the East Division. In May 2013 it was a relatively new and unique problem.

¹ The parties use the terms “scooter” and “moped” interchangeably. There is no material difference; it is undisputed that the motor vehicle R [REDACTED] was operating was motorized and operating under motor power at all relevant times, whichever term is used.

In response, PPD implemented multiple details and initiatives. These included special operations with targeted deployment of 30 to 50 officers at a time, authorization of overtime, coordinated deployment of officers trained and qualified on motorized dirt bikes, and utilization of PPD Aviation Unit helicopters.

Also in response to this undisputedly serious, dangerous and ongoing crime and quality of life problem, PPD supervisors in the East Division considered it a vital measure for officer safety – including it being a matter of life-or-death, to regularly warn and inform East Division officers at roll calls about the latest information, knowledge, data and intelligence about this ongoing criminal activity, and what to be on the lookout for. Additionally, PPD utilized text messages, emails, email blasts, websites, media relations, and social media such as YouTube and Twitter, to warn and inform PPD officers and the public about this ongoing problem.

Lt. H [REDACTED] testified he was assigned as Grievants' direct supervisor (as a Sergeant) at the time of the incident, and for many months prior thereto. His testimony established that both Grievants were present at many such roll calls, and participated in many of the details, initiatives and special operations mounted against this problem, including "scooter confiscation" details.

On May 29, 2013, Grievants were on patrol in the 25th District performing an 8 PM to 4 AM "drop back" tour in marked RPC # [REDACTED]. Robinson was the Driver/Operator and McKnight the Recorder.

At approximately 2150 hours Grievants were patrolling in the RPC, westbound on Somerset St. They observed a male operating a scooter northbound on 7th Street

disregard the stop sign at the intersection of 7th and Somerset Streets. Grievants turned north onto 7th Street. They observed the scooter operator glance back at them at least twice, as both vehicles proceeded northbound on 7th Street. 7th Street is a one-way northbound street, consisting of one traffic lane, and parking lanes along the east and west curbs.

Grievants observed the scooter operator illegally pass three (3) cars in the traffic lane, passing the cars on their right (*i.e.*, operating between the cars in the traffic lane, and the parked cars in the eastern parking lane). Grievants then observed the motorist disregard the stop sign controlling the intersection of 7th and Cambria Streets. Without stopping, the scooter turned right, proceeding eastbound on Cambria Street (a one-way eastbound street). Grievants activated the RPC's lights and sirens and pulled the motorist over for a vehicle investigation on southbound Marshall Street, south of the intersection of Marshall and Cambria Streets. Grievants deactivated the siren, exited the RPC and approached the stopped motorist on foot. The motorist was seated on the scooter. As Grievants walked to within a few feet of him, the motorist drove off southbound at a high rate of speed. Grievants returned to the RPC, but lost sight of the scooter and its operator because Marshall Street is not a through-street on that block; it curves 90 degrees west and becomes Rush Street instead of intersecting with Somerset Street to the south. Grievants deactivated the lights, and began to survey the area without giving chase.

Approximately five (5) to ten (10) minutes later, Grievants observed the same male operating the same scooter on Lehigh Avenue, near 7th Street. Grievants observed

the scooter operator recklessly endangering the public by driving the scooter eastbound on Lehigh Avenue in the westbound traffic lanes. Lehigh Avenue is a major east-west thoroughfare, consisting of two (2) eastbound and two (2) westbound traffic lanes, a center turning lane, and parking lanes along the north and south curbs. At the time, Lehigh Avenue was busy with traffic in both directions. Grievants observed the scooter forcing vehicles driving on Lehigh Avenue to swerve to avoid colliding with it.

Grievants turned onto Lehigh to follow the scooter. Grievants observed the scooter operator look at them at least once. The scooter operator suddenly turned left from Lehigh Avenue onto 6th Street, proceeding northbound. 6th Street is a one-way southbound street, consisting of one traffic lane, and parking lanes along the east and west curbs. The scooter was proceeding the wrong way on a one-way, one traffic lane street. Grievants drove northbound on 6th Street to attempt to stop the scooter again.

The events which transpired next on 6th Street, between Lehigh Avenue and Somerset Street, gave rise to the Conduct Unbecoming charges against Grievants which are the subject of this grievance arbitration.

The Code charges will now be discussed individually. Grievants received nearly identical sets of Code charges, differing only where the charges against McKnight refer to Robinson, and vice versa. There are no material differences between the sets of charges. The charges are quoted *verbatim*, in single-spaced, double-indented *italics*. The charges are discussed in separate sections (I, II and III), in chronological order of occurrence: I. Alleged unauthorized and/or excessive use of force (1-§012-10); II. Allegedly knowingly and willfully making false entries in PPD records or reports

(1-§010-10); and III. Allegedly engaging in any action that constitutes a crime (1-§026-10). All of the underlying conduct undisputedly occurred while Grievants were acting in their official capacity.

I. Conduct Unbecoming, Section 1-§012-10: Unauthorized and/or excessive use of force in your official capacity:

McKnight 1-§012-10 Charge:

“A Grand Jury investigation found that on Wednesday, May 29, 2013, you and your partner, Officer Kevin Robinson #3547, while acting in your official capacity as police officers, were in your police vehicle when you assaulted N [REDACTED] R [REDACTED] by knocking him off of his motor scooter and then hitting him repeatedly with a baton and fists causing him bodily injury, including a fractured orbital and numerous facial cuts requiring stitches and staples. Video surveillance evidence showed your police vehicle striking Mr. R [REDACTED]. From the brunt of the impact, Mr. R [REDACTED] then crashes in towards the police vehicle before spinning around and falling off of the scooter onto the ground. You exit the passenger side door and Officer Robinson exit the driver’s side door of the police vehicle. Both you and Officer Robinson grabbed Mr. R [REDACTED]. Officer Robinson pulled Mr. R [REDACTED] towards the wall while you struck him with a baton a few times. Officer Robinson pushed Mr. R [REDACTED] up against the wall while you continue to strike him. Officer Robinson eventually brought Mr. R [REDACTED] down to the ground and both you and Officer Robinson repeatedly strike him with the baton and fists. Throughout the encounter, Mr. R [REDACTED] was wailing loudly and uncontrollably. Although he was moving around on the ground while being struck, Mr. R [REDACTED] was not resisting you or engaging in any aggressive actions. After about 40 seconds of continued repeated strikes, you and Officer Robinson placed Mr. R [REDACTED] into handcuffs and held him down with a foot on his back. For at least four minutes, either you or Officer Robinson kept a foot on Mr. Rivera’s back as he lay on the ground bleeding. Mr. R [REDACTED] was brought to Episcopal Hospital where he [REDACTED].” Joint Exhibit 3.

Robinson 1-§012-10 Charge:

“A Grand Jury investigation found that on Wednesday, May 29, 2013, you and your partner, Officer Sean McKnight #7574, while acting in your official capacity as police officers, were in your police vehicle when you assaulted N [REDACTED] R [REDACTED] by knocking him off of his motor scooter and then hitting him repeatedly with a baton and fists causing him bodily injury, including a fractured orbital and numerous facial cuts requiring stitches and staples. Video

surveillance evidence showed your police vehicle striking Mr. R[REDACTED]. From the brunt of the impact, Mr. R[REDACTED] then crashes in towards the police vehicle before spinning around and falling off of the scooter onto the ground. You exit the driver side door and Officer Sean McKnight exits the passenger side door of the police vehicle. Both you and Officer McKnight grabbed Mr. R[REDACTED]. You pulled Mr. R[REDACTED] towards the wall while Officer McKnight struck him with a baton a few times. You pushed Mr. R[REDACTED] up against the wall while Officer McKnight continues to strike him. You eventually brought Mr. R[REDACTED] down to the ground and both you and Officer McKnight repeatedly strike him with the baton and fists. Throughout the encounter, Mr. R[REDACTED] was wailing loudly and uncontrollably. Although he was moving around on the ground while being struck, Mr. R[REDACTED] was not resisting you or engaging in any aggressive actions. After about 40 seconds of continued repeated strikes, you and Officer McKnight placed Mr. R[REDACTED] into handcuffs and held him down with a foot on his back. For at least four minutes, either you or Officer McKnight kept a foot on Mr. R[REDACTED] back as he lay on the ground bleeding. Mr. R[REDACTED] was brought to Episcopal Hospital where he [REDACTED].” Joint Exhibit 4.

The allegations of unauthorized and/or excessive use of force can be divided into two (2) categories: 1) assault with and from the police vehicle prior to the physical altercation, and, 2) subsequent to the scooter crash, the physical altercation involving Grievants and R[REDACTED].

I 1. “Assault with Police Vehicle Prior to the Physical Altercation”:

“[A]ssaulted N[REDACTED] R[REDACTED] by knocking him off of his motor scooter . . . Video surveillance evidence showed your police vehicle striking Mr. R[REDACTED]. From the brunt of the impact, Mr. R[REDACTED] then crashes in towards the police vehicle before spinning around and falling off of the scooter onto the ground.” Joint Exhibits 3 and 4.

This component of the charges is based upon Grievants’ alleged use of their police vehicle during the incident on 6th Street, between Lehigh Avenue and Somerset Street. The City argues there are two (2) independent bases for the unauthorized/excessive use of force charge *prior to* the unauthorized/excessive use of force charge during the physical altercation: Robinson using the moving RPC to knock R[REDACTED] off the

moving scooter, and McKnight reaching from the moving RPC to grab R[REDACTED] while R[REDACTED] was operating the moving scooter. The City also argues Grievants were engaged in an unauthorized pursuit in violation of Directive 45.

I 1a. “Robinson using the moving RPC to knock R[REDACTED] off the moving scooter”:

Lt. Sandusky testified that if the incident concluded at 00:56² (i.e., prior to the vehicles coming to a stop) there already was excessive use of force because the RPC was used to knock R[REDACTED] off the scooter. He testified the video appears to show the RPC collided with the scooter, causing R[REDACTED] to lose control and fall off the scooter. On cross-examination, Lt. Sandusky acknowledged that contact between the RPC and scooter is not actually visible in the video.

Lt. Sandusky interviewed R[REDACTED] during the IA investigation. Although there was much of the incident that R[REDACTED] did not remember, he did state to Lt. Sandusky that he was knocked off the scooter. R[REDACTED] also stated to Lt. Sandusky he did not know what caused him to crash the scooter.³

² Time references to the video (Joint Exhibit 2) are in mm:ss format. They are derived from the time display of the video player. They are as close as possible to actual times, but technical and human limitations render them approximate times.

³ R[REDACTED] statements to Lt. Sandusky and Det. Brooks are in the record as part of the IA report (City Exhibit 8) and Lt. Sandusky’s and Det. Brooks’ testimony. R[REDACTED] statements are hearsay. He did not testify at this arbitration hearing (nor Grievants’ criminal trial) because he was the victim of a homicide by gunfire in Philadelphia in December 2015. Allegedly, R[REDACTED] was engaged in street sale of illegal drugs when he was killed. However, the circumstances of his homicide were not proven in the record, and have not been taken into consideration in the rendering of this Opinion; no inference has been drawn from R[REDACTED] death or circumstances thereof. It is undisputed there is absolutely no allegation or suspicion that Grievants or any other law enforcement officers had anything to do with R[REDACTED] death.

The poor quality of the video renders it of little or no probative value on this particular allegation. The video does not establish that the RPC and scooter collided or came into contact. Nor is there physical or photographic evidence of contact or collision. Lt. Sandusky reported the RPC, “did not have any significant damage that could be attributed to this incident.” He saw some minor scratches on the RPC, but could not determine that they came from this incident or this scooter. He also reported that the owner of the scooter⁴ did not respond to letters and requests, “to schedule an interview and look at the scooter.” City Exhibit 8, Page 6.

The video does show the northbound RPC was proceeding at an angle, albeit shallow, towards the adjacent northbound scooter, rather than parallel to the scooter and curb. However, when the vehicles come into the video frame at 00:53 there are several feet of space between the passenger side of the RPC and the curb. When the scooter crashes at 00:54 there are still several, albeit fewer, feet of space between the passenger side of the RPC and the curb. The record does not support the City’s arguments that the RPC “rammed” or “roadblocked” the scooter, or that the RPC “pinched” the scooter into the curb, causing the scooter to crash.

In the absence of proof that the RPC and scooter/R[REDACTED] collided or came into contact, or that the RPC caused the scooter to crash, the record does not establish that Robinson’s operation of the RPC constituted unauthorized and/or excessive use of force.

⁴ R[REDACTED] was not the owner of the scooter. On the date of the incident the scooter was not reported stolen, but its registration was expired.

I 1b. “McKnight reaching from the moving RPC to grab R[REDACTED] on the moving scooter”:

Lt. Sandusky testified that at 00:52 the video appears to show someone reaching out of the passenger-side open window of the RPC toward R[REDACTED] on the scooter. McKnight, as the Recorder, was seated in the front passenger seat. McKnight testified he reached out of the RPC window at 00:52 in an unsuccessful attempt to stop R[REDACTED] by grabbing him. He testified he did so in one last attempt to stop R[REDACTED] before he reached the next block, where North 6th Street changes to residential. McKnight testified it was a spur of the moment action that he was not taught by PPD, and that he had never done this before. It is undisputed that such a tactic is not taught or authorized by PPD.

McKnight is five feet, six inches (5' 6") tall. He testified that he has relatively short arms for his height. This fact was objectively apparent in the hearing room. He testified his attempt to grab R[REDACTED] was unsuccessful, because with his short arms he was not able to reach or touch R[REDACTED] from the Recorder's position in the RPC.

The poor quality of the video renders it of little or no probative value on this particular allegation. The video does not contradict McKnight's testimony, and does not establish that McKnight did reach or touch R[REDACTED].

Therefore, the record does not support the City's arguments that McKnight grabbed R[REDACTED] or pulled R[REDACTED] down to the ground off the scooter. Thus, McKnight's attempt to do so *may* have been unauthorized or excessive under the circumstances. However, the charge is “unauthorized and/or excessive use of force”, not “*unsuccessful attempted* unauthorized and/or excessive use of force”.

Therefore, the City has not proven its allegation that Grievants assaulted R [REDACTED] before the physical altercation.

This raises the question: If Robinson did not knock R [REDACTED] off the scooter with the RPC, and McKnight did not grab R [REDACTED] off the scooter or pull him to the ground from the RPC, why/how did R [REDACTED] crash the scooter? On cross-examination, Lt. Sandusky agreed he does not know why or how R [REDACTED] fell from the scooter. There are a number of possible reasons why R [REDACTED] fell from, or crashed, the scooter. These possible reasons are at least as likely as the charged reasons.

For instance, there is no evidence that R [REDACTED] was licensed to operate any motor vehicle, let alone a two-wheel motor vehicle. At R [REDACTED] age of 21 years at the time, one may reasonably wonder how much motor vehicle operator experience R [REDACTED] had, licensed or unlicensed, two-wheel or four-wheel. He may have been distracted from whatever driving ability he did possess, because he was driving the wrong way on a one-way street. He may also have been distracted because a few minutes earlier he had fled from a lawful police vehicle investigation. It is also likely R [REDACTED] turned north onto 6th Street because he saw the Grievants' marked police car as he drove recklessly the wrong way on busy 4-lane Lehigh Avenue, as he fled the lawful police vehicle investigation, and was trying to avoid being stopped by the police again. One can reasonably conclude from the record that R [REDACTED] knew Grievants were the police: it was a marked patrol car with overhead light bar and PPD reflective signage; R [REDACTED] had been pulled over by Grievants in their marked police car just a few minutes earlier, just a few blocks away, and fled therefrom on the scooter after Grievants exited

the RPC and approached him on foot during the vehicle investigation.

R█████ may have been distracted enough to crash the scooter for reasons of a more personal nature: R█████ stated to Det. Brooks that “he ran from the police [Grievants] because he was scared, that his father had been killed by police. . . .” City Exhibit 8, Page 5. This sheds light on R█████ irrational behaviors during his encounters with Grievants on the night of the incident.

Additionally, an inference can fairly be drawn that R█████ may have been driving the scooter under the influence of controlled substance(s). Grievants gave credible un rebutted testimony that R█████ behavior at the initial vehicle investigation, his reckless driving, his loss of control of the scooter, his out of control screaming/wailing, his refusal to comply with lawful police orders, and his apparent insensitivity to pain were consistent with their training and experience as indicative of someone who is under the influence of PCP or other illegal narcotics. On the night of R█████ arrest McKnight stated to Det. Brooks that R█████ appeared to be on PCP or other narcotics. City Exhibit 1, Page 2. When interviewed by Lt. Sandusky, R█████ refused to sign a release for his medical records. City Exhibit 8, Page 2. IA obtained R█████ medical records from Temple Episcopal Hospital in January 2014 pursuant to a search warrant. The medical records were turned over to the DA’s office. City Exhibit 8, Page 6. However, R█████ medical records were not offered in this arbitration.

Thus, there are a number of reasonably probable factors, that individually or in combination, are likely to have caused R█████ to crash the scooter without contact from the police vehicle operated by Robinson, and without being touched or grabbed by

McKnight from the police vehicle.

Therefore, the record does not support the City's allegations that either Robinson or McKnight assaulted R [REDACTED] with, or from, the RPC prior to the physical altercation.

I 1c. "Unauthorized Pursuit":

Lt. Sandusky testified the video appears to show that Grievants were in a "pursuit" without authorization, in violation of Directive 45 "Safe Operation of Police Vehicles" (City Exhibit 9, Page 4, Section IV). It is undisputed Grievants did not have lights and sirens on, which Lt. Sandusky testified is a clear violation of Directive 45 (City Exhibit 9, Page 7, Paragraph I). He noted Directive 45 prohibits "boxing-in" and "ramming" as methods to stop pursued/fleeing vehicles (City Exhibit 9, Page 10, Paragraph Q1). He testified he believes the video shows Grievants impermissibly used these methods during the incident. The Union argues that violations of Directive 45 are not charged, and therefore are not within the scope of this arbitration.

The Code contains a specific charge for "Failure to follow Departmental procedures involving pursuit and/or emergency driving" (Section 7-§004-10 of Joint Exhibit 1). Grievants are not charged with violation of Section 7-§004-10. Therefore, such charges are beyond the scope of this arbitration.

I 2. "Unauthorized/Excessive Force During the Post-Crash Physical Altercation":

McKnight:

"[Y]ou and your partner, . . . while acting in your official capacity as police officers. . . hitting him repeatedly with a baton and fists causing him bodily injury, including a fractured orbital and numerous facial cuts requiring

stitches and staples. . . . Both you and Officer Robinson grabbed Mr. R[REDACTED]. Officer Robinson pulled Mr. R[REDACTED] towards the wall while you struck him with a baton a few times. Officer Robinson pushed Mr. R[REDACTED] up against the wall while you continue to strike him. Officer Robinson eventually brought Mr. R[REDACTED] down to the ground and both you and Officer Robinson repeatedly strike him with the baton and fists. Throughout the encounter, Mr. R[REDACTED] was wailing loudly and uncontrollably. Although he was moving around on the ground while being struck, Mr. R[REDACTED] was not resisting you or engaging in any aggressive actions. After about 40 seconds of continued repeated strikes, you and Officer Robinson placed Mr. R[REDACTED] into handcuffs and held him down with a foot on his back. For at least four minutes, either you or Officer Robinson kept a foot on Mr. R[REDACTED] back as he lay on the ground bleeding.”
Joint Exhibit 3.

Robinson:

“[Y]ou and your partner, . . . while acting in your official capacity as police officers. . . hitting him repeatedly with a baton and fists causing him bodily injury, including a fractured orbital and numerous facial cuts requiring stitches and staples. . . . Both you and Officer McKnight grabbed Mr. R[REDACTED]. You pulled Mr. R[REDACTED] towards the wall while Officer McKnight struck him with a baton a few times. You pushed Mr. R[REDACTED] up against the wall while Officer McKnight continues to strike him. You eventually brought Mr. R[REDACTED] down to the ground and both you and Officer McKnight repeatedly strike him with the baton and fists. Throughout the encounter, Mr. R[REDACTED] was wailing loudly and uncontrollably. Although he was moving around on the ground while being struck, Mr. R[REDACTED] was not resisting you or engaging in any aggressive actions. After about 40 seconds of continued repeated strikes, you and Officer McKnight placed Mr. R[REDACTED] into handcuffs and held him down with a foot on his back. For at least four minutes, either you or Officer McKnight kept a foot on Mr. R[REDACTED] back as he lay on the ground bleeding.”
Joint Exhibit 4.

For purposes of discussion, the post-crash physical altercation charges can be divided into three (3) components, which will be discussed below as 2a through 2c.

Retired PPD Sgt. Ebner (“Sgt. Ebner”) provided the hearing’s expert testimony, which withstood the City’s rigorous cross-examination, on the use of force in the video. His testimony covered all alleged use of force in the video, with focus on the post-crash

physical altercation. His resume is in the record as Union Exhibit 4. Among its highlights are that from 1989 to 2013 he was a state-certified Trainer teaching Use of Force in the PPD Academy to thousands of recruits and officers; he is certified by the Pennsylvania Municipal Police Officers Education and Training Commission (“MPOETC”) as an Instructor For Professional Law Enforcement Skills, and as a Special Instructor for Application and Use of Force; he is one of the few MPOETC-certified Instructors who are authorized to certify others as Instructors in the Application and Use of Force (*i.e.*, “train the trainer”) in Pennsylvania; he has developed and delivered Instructor certification courses for Application and Use of Force for police academies throughout Pennsylvania.

Sgt. Ebner is credited with over 3,000 arrests in the 18th District. His duties with PPD included reviewing and opining for PPD IA on incidents under review for determination by PPD whether or not to charge officers with unauthorized and/or excessive use of force. Since 1990 or so, he has testified approximately 25 to 30 times in court as the City’s expert witness regarding use of force.

During the hearing, the parties watched the video together a number of times, in real time, slow motion, stop/start, rewind, etc. The same was done during Sgt. Ebner’s testimony.

Sgt. Ebner thoroughly reviewed the video and paperwork of this incident. He testified that Grievants’ use of force throughout the incident was consistent with the City’s use of force policies, with the force continuum, and with the use of force training Grievants received in the PPD Police Academy.

Sgt. Ebner's testimony established that PPD officers, including Grievants (at least one of whom, possibly both, was/were trained by him) are trained that: it is crucial for officers to gain control of a situation, and to do so as soon as possible; people usually prefer to keep weapons in their waistband area, for concealment and ease of reach; weapons can be deployed from the waistband area in less than half a second, whether standing or on the ground; the waistband area is known as the "red zone"; "when you see red, you're dead", meaning a person reaching for their waistband area is a lethal threat justifying use of deadly physical force with whatever an officer has access to at the time, whether or not a weapon can be seen in the "red zone"; and that "when you see red, you're dead" applies in all situations, whether the person reaching for their waistband is standing or on the ground.

It is undisputed that at 00:59, while the scooter is laying on the ground, the scooter headlight moves, sweeping the camera with bright light which obscures the video frame for approximately one (1) second. The headlight movement was caused by R[REDACTED] taking hold of the scooter's handlebars. The record shows that R[REDACTED] did so to continue to evade Grievants, either by standing the scooter up to ride away on it, or by using the scooter as a prop to get himself on his feet to flee on foot. Both Sgt. Ebner on direct, and Lt. Sandusky on cross-examination, acknowledged either of these is consistent with the video.

I 2a. "[Both] Grievants grabbed R[REDACTED] . . . Robinson pulled R[REDACTED] towards the wall while McKnight struck him with a baton a few times . . . Robinson pushed R[REDACTED] up against the wall while McKnight continued to strike him . . .":

After the video image returns from the headlight sweep white-out, Robinson and

R[REDACTED] are grappling between the scooter and the wall. Both Sgt. Ebner on direct, and Lt. Sandusky on cross-examination, acknowledged that it is impossible to discern from the video who is “in charge of” or “controlling” the grappling. Robinson’s credible and un rebutted testimony is that R[REDACTED] was in control of the grappling, refusing to submit, refusing to be controlled, and steering Robinson toward and into the wall.

I 2b. “Robinson eventually brought R[REDACTED] down to the ground and both [Grievants] repeatedly strike him with the baton and fists. Throughout the encounter, Mr. R[REDACTED] was wailing loudly and uncontrollably. Although he was moving around on the ground while being struck, Mr. R[REDACTED] was not resisting you or engaging in any aggressive actions. After about 40 seconds of continued repeated strikes, [Grievants] placed R[REDACTED] into handcuffs . . .”:

The record establishes that at 1:05, Robinson was able to break free of R[REDACTED] grasp and get R[REDACTED] to the ground; R[REDACTED], on his back on the ground, continued to resist; at 1:06 R[REDACTED] drew his legs and knees toward his chin in a coiled position described as a “counterstrike posture” by Sgt. E[REDACTED], thus continuing to refuse to comply, and continuing to pose a threat to the Grievants. At 1:08, as the struggle with combative, non-compliant R[REDACTED] continued, R[REDACTED] extended his legs quickly, in a kicking motion toward one of the Grievants. At 1:09, while continuing to resist on the ground, R[REDACTED] twisted himself from supine to prone.

For almost 30 seconds, R[REDACTED] failed to comply with verbal commands and continued to struggle on the ground in the prone position. McKnight struck R[REDACTED] with an extended Asp four (4) or five (5) times. Both Sgt. Ebner on direct, and Lt. Sandusky on cross-examination, acknowledged these Asp strikes appeared to be on R[REDACTED] upper arm area – an authorized Asp target area, and did not appear to be excessive.

These Asp strikes did not succeed in obtaining R[REDACTED] compliance. R[REDACTED] and continued to struggle and resist.

Grievants were able to get R[REDACTED] left hand into a handcuff, but not his right hand. R[REDACTED] was not under control and continued to pose an immediate threat to Grievants' safety. During this part of the struggle R[REDACTED] was able to cause McKnight's Asp to hit the sidewalk, collapsing the Asp into its handle, in the closed position. Immediately upon this happening, R[REDACTED] moved his right hand under his body, toward his waistband area. R[REDACTED] continued to fail to comply with verbal commands.

McKnight, seeing R[REDACTED] reaching into his "red zone" while continuing to struggle and continuing to refuse to obey commands, reasonably feared R[REDACTED] was reaching between his [R[REDACTED]] body and the ground with his right hand for a gun in his [R[REDACTED]] waistband. Reasonably fearing R[REDACTED] was imminently about to use deadly physical force (gun), McKnight used the closed Asp in his hand to strike R[REDACTED] in the face. Both Sgt. Ebner on direct, and Lt. Sandusky on cross-examination, acknowledged that under these circumstances, using the closed Asp to strike R[REDACTED] in the face was not unauthorized and/or excessive use of force.

The City argues McKnight testified he was "never so sure" someone was about to reach for a gun as when R[REDACTED] reached for his waistband, yet, it is undisputed that R[REDACTED] did not in fact have a gun. This argument is not persuasive. The record establishes McKnight had a reasonable belief at the time that R[REDACTED] was reaching into the "red zone" for a gun. What matters is that the belief was reasonable, not whether the belief turned out to be correct or not.

The closed-Asp strike to the face ended R █████ resistance. At 1:38 the struggle ended with R █████ being fully handcuffed.

R █████ wailing during the encounter was discussed above. His wailing is primarily and/or completely attributable to the likelihood he was under the influence of PCP or other narcotics, and/or a function of his self-described fear of police.

I 2c. “[Grievants] placed R █████ into handcuffs and held him down with a foot on his back. For at least four minutes, either McKnight or Robinson kept a foot on R █████ back as he lay on the ground bleeding.”:

The poor quality of the video renders it of little or no probative value on this particular allegation. The video does not establish that either Grievant put a foot on R █████ back. The video does not contradict either Grievant’s testimony that they did not put a foot on R █████ back. The allegation is not supported by testimony or other evidence.

The record establishes R █████ made it necessary for Grievants to use force to lawfully arrest him. The record does not establish that either Grievant engaged in unauthorized and/or excessive use of force to do so. The record establishes Grievants stayed within the City’s use of force Directives and policies, within the force continuum, within their use of force training, and de-escalated use of force as soon as the situation was under control. Throughout the incident R █████ refused to submit to being arrested, and failed to comply with any of the verbal commands given by Grievants. The situation was not under control until R █████ two (2) hands were handcuffed. There is no allegation, nor evidence, of force used against R █████ once he was fully handcuffed, other than the unproven allegation of a foot on his back. Not a

single gratuitous shove, slap, punch or kick in the dark of night, despite Grievants having no knowledge of a video camera recording their actions.

It is undisputed that as soon as R [REDACTED] was fully handcuffed, Grievants immediately radioed for an ambulance and supervisor. It is undisputed that as soon as the patrol sergeant arrived on the scene, Grievants immediately informed him of McKnight's use of a closed Asp strike to R [REDACTED] face during the struggle.

Therefore, the City did not have just cause to find that Grievants violated Disciplinary Code Section 1-§012-10.

II. Conduct Unbecoming, Section 1-§010-10: Knowingly and willfully making a false entry in any Departmental record or report:

McKnight 1-§010-10 Charge:

"A Grand Jury Investigation found that you and your partner, Officer Kevin Robinson #3547, falsified police reports, including statements to the assigned detective and Use of Force reports, in order to effectuate the arrest and criminal charges against Mr. N [REDACTED] R [REDACTED] on Wednesday, May 29, 2013."
Joint Exhibit 3.

Robinson 1-§010-10 Charge:

"A Grand Jury investigation found that you and your partner. Officer Sean McKnight #7574, falsified police reports, including statements to the assigned detective and Use of Force reports, in order to effectuate the arrest and criminal charges against Mr. N [REDACTED] R [REDACTED] on Wednesday, May 29, 2013."
Joint Exhibit 4.

The City bases this component of the charges on alleged omissions and inaccuracies in Grievants' statements to Det. Brooks, and Grievants' Use of Force reports. In particular, the City alleges that:

II 1: "No mention by Grievants to Det. Brooks of ramming or roadblocking the scooter with the RPC, even though the video shows the closeness of the RPC to the scooter. No mention by Grievants to Det. Brooks of the closeness of the RPC to the scooter and the scooter to the curb":

As concluded in Section I, Use of Force, the record does not support the City's arguments that the RPC "rammed" or "roadblocked" the scooter. Nor, that there was contact between the moving RPC and scooter, or, contact between McKnight and R[REDACTED] and/or the scooter. Nor, that the RPC "pinched" the scooter into the curb, or caused the scooter to crash.

Therefore, Grievant's cannot be faulted for not reporting same to Det. Brooks.

II 2: "McKnight's testimony of trying to reach out of the RPC window to grab R[REDACTED] on the scooter while both vehicles were moving does not appear in the reports":

The City is correct that this was omitted from the reports. However, the attempt was unsuccessful, and, made no material difference to the incident, the arrest or the criminal charges against R[REDACTED].

II 3: "Grievants did not merely "observe [R[REDACTED]] lose control of the scooter and fall to the ground." And, it is very surprising that both Grievants used the same vague language regarding a fast and violent crash":

As discussed previously, the record does not establish that Grievants caused R[REDACTED] to crash the scooter. Nor does it establish how or why R[REDACTED] crashed. Therefore, as Lt. Sandusky acknowledged on cross-examination, since neither he, Grievants, nor anyone else knows from the record what caused R[REDACTED] to crash the scooter, Grievants cannot be faulted for reporting that they "observed [R[REDACTED]] lose control and fall to the ground". Grievants' use of the passive rather than active voice does not render this phrase inaccurate. Instead, the record supports Grievants' testimony that reporting a cause to the scooter crash would have been speculation, not fact.

Therefore, Grievants had no reason to indicate the RPC as a means of force on their Use of Force reports.

Det. Brooks testified that “partners’ stories can be too similar or too far apart.” Thus, it is persuasive that he testified Grievants’ stories were neither too similar nor too far apart. Likewise, it is persuasive that Det. Brooks testified that the use of this phrase by both Grievants did *not* raise a red flag.

All witnesses, including Lt. Sandusky and Det. Brooks, agreed there is no directive or policy stating the amount of detail to include or not include in such reports.

The City argues that Grievants’ reporting was intentionally misleading, in that the context in which this phrase was used by Grievants can mislead a reasonable reader into thinking Grievants were behind the scooter, rather than next to it, when it crashed. The City is correct that Grievants omitted from their reports the closeness with which Robinson operated the RPC to the scooter, and McKnight’s attempt to grab R [REDACTED] while both vehicles were in motion. The City argues Grievants did this to obscure their involvement in allegedly causing R [REDACTED] to crash. However, because the record does not establish that Grievants caused R [REDACTED] to crash, and because the record does not support a finding that Grievants intended to deceive, neither the phrase nor the context in which it was used constitute knowingly and willfully making false entries.

II 4: “Grievants mis-described R [REDACTED] as the aggressor, recommending he be charged with assaulting police even though Grievants had no injuries, while R [REDACTED] arrest photos show significant injuries”:

The record demonstrates R[REDACTED] was in fact the aggressor. Grievants did not mis-describe R[REDACTED] as the aggressor.

Furthermore, the record is devoid of any evidence that determining who was the aggressor depends upon who sustains injury, or upon who is injured more or less seriously than the other. The record documents that Robinson reported minor pain resulting from this incident, but did not seek medical attention. R[REDACTED] arrest photos show significant injuries because he chose to initiate a violent confrontation, and during the ensuing struggle reached into his waistband – the “red you’re dead” “red zone” taught to Grievants in the PPD Police Academy -- despite lawful police orders, commands and directions not to do so. As a result, he was eventually struck in the face with a closed Asp, after a number of extended-Asp strikes to the upper arm area were ineffectual, and R[REDACTED] himself caused McKnight’s Asp to close. As discussed in Section I, none of these Asp strikes were unauthorized or excessive under the circumstances.

It is undisputed R[REDACTED] sustained injuries from the scooter crash. Notably, if Grievants were inclined to make knowing and willful false statements/entries in the absence of knowledge of the incident being recorded on video, Grievants could have, but did not, falsely attribute some or all of R[REDACTED] injuries to his fall from the scooter. Instead of volunteering to the patrol supervisor at the scene and writing in their reports that R[REDACTED] was struck in the face (normally a non-authorized target area) with a closed rather than extended Asp, Grievants could have reported R[REDACTED] sustained his facial (and other) injuries when he fell from the scooter. It is undisputed R[REDACTED] was not wearing a helmet or protective gear, and that a [REDACTED] is

consistent with a scooter crash. Had Grievants done so, the record establishes no one would have known. Even the video evidence would not contradict this. But, Grievants were not so inclined, and did not falsely report.

II 5: “Inaccuracies regarding how far Grievants ran after R■■■■, and how long it took during the struggle to bring R■■■■ to the ground”:

McKnight reported that after the scooter crash, R■■■■, “attempted to run. We ran about 15-20 feet when my partner [Robinson] was able to catch up to him. I was approx. 10-12 feet back when this happened. . . . myself and partner after about 1~ minute were able to get this male to the ground.” City Exhibit 1.

As noted in Section I 2, at 00:59, while the scooter was laying on the ground, R■■■■ took hold of the handlebars to continue to evade Grievants, either by standing the scooter up to ride away on it, or by using the scooter as a prop to get himself on his feet to flee on foot. Thus, it was not inaccurate to report that R■■■■ “attempted to run . . . “

When the scooter crashed, the RPC was still moving northbound on 6th Street. When it came to a stop, the rear of the RPC was north of the scooter. The RPC is a mid-size sedan. A typical mid-size sedan measures approximately 15 feet in length, give or take. Therefore, when Grievants exited the RPC, to reach R■■■■ they had to traverse southward the distance from the front doors of the RPC to the rear of the RPC, plus the distance between the rear of the RPC to R■■■■. The actual distances involved are not in the record, and not readily ascertainable or calculable in the video, but do not appear from the video to differ materially from the reported distances. Thus, it was not

inaccurate to report that “We ran about 15-20 feet . . .”

According to the video, the struggle began at the 1:00 mark, R[REDACTED] was on the ground resisting at 1:06, and the struggle ended at 1:38. Again, not a material difference from what was reported.

Additionally, it is undisputed that violent altercations of this nature can cause misperceptions of time, distance and sequence of events. Reporting such misperceptions does not necessarily constitute knowingly and willfully making false entries if they are honestly believed. McKnight testified credibly he believed these were accurate statements.

Thus, these alleged inaccuracies were not materially inaccurate, were not made with intent to deceive, and did not constitute knowingly and willfully made false entries under these facts and circumstances.

II 6: “In order to effectuate the arrest and criminal charges against R[REDACTED]”:

Grievants were attempting to effectuate a lawful arrest of R[REDACTED]. It is undisputed Grievants had probable cause to arrest R[REDACTED] prior to the scooter crash and physical altercation, at the very least for the crime of Recklessly Endangering Another Person (“REAP”). R[REDACTED] combative refusal to be arrested and his use of force necessitated Grievants’ use of force to effectuate the arrest.

The record establishes there are many “moving parts” in determining what criminal charges are lodged against an arrestee. These moving parts include the arresting officers, the patrol supervisor, the interviewing detective and the ADA. Grievants informed patrol supervisor Sgt. S[REDACTED] at the scene of what had transpired.

Sgt. S [REDACTED] decided the charges, including Aggravated Assault. Aggravated Assault is the charge which applies to Assault on Police. Det. Brooks testified the charges lodged against R [REDACTED] (City Exhibit 4) are the standard charges for an incident such as this.

Det. Brooks testified this arrest came into the Detective Division Wheel already coded as Assault on Police, which is normal procedure; Grievants never said to him they wanted Grievant charged with Assault on Police. He testified R [REDACTED] was charged with the standard charges for an incident such as this; these charges were nothing unusual. His recollection was that the ADA agreed with the charges he recommended, and he added the charge of Unauthorized Use of a Vehicle upon the ADA's recommendation. Det. Brooks recommended the charges based upon the narratives provided by Grievants. He found Grievants' narratives neither too similar nor too different from each other, and stated Grievants' narratives did not raise any red flags for him. At the time, Det. Brooks was a detective for approximately 13 years, following approximately 10 years as a police officer on patrol, all with PPD.

Det. Brooks testified Grievants told him R [REDACTED] was throwing elbows and they were not sure if R [REDACTED] elbows connected with Grievants. Grievants told Det. Brooks that McKnight struck R [REDACTED] with a closed Asp when he thought R [REDACTED] was reaching for a gun in his [R [REDACTED]] waistband while on the ground during the struggle. Det. Brooks acknowledged he would have had no way to know this information unless Grievants told him so. It is undisputed that use of an Asp is like use of a baton: unlike firearms and tasers, there is no automatic evidence of use.

The Union argues Grievants could have easily embellished or fabricated a story

attributing substantially worse actions to R[REDACTED], and/or blaming R[REDACTED] injuries on the scooter crash, particularly in the absence of knowledge of cameras, but did not do so. The Union submits this is proof Grievants had no intent to deceive, or to make knowingly and willfully false entries in any Department record or report. This is a persuasive argument under the facts and circumstances of this record.

The record establishes that Grievants' arrest of R[REDACTED], Grievants' use of force in effectuating the arrest, and the criminal charges lodged against R[REDACTED], were all lawful and legitimate, independent of any misperceptions or potentially misleading reports by Grievants. Given the undisputed fact that incidents of this nature are prone to misperceptions of time, distance and sequence of events, given the lack of evidence of intent to deceive, and given the lack of evidence of excessive and/or unauthorized force, under the facts and circumstances of this record, Grievants' statements and reports do not constitute knowing and willful false entries in Department records or reports.

Therefore, the City did not have just cause to find that Grievants violated Disciplinary Code Section 1-§010-10.

III. Conduct Unbecoming, Section 1-§026-10: Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters:

McKnight 1-§026-10 Charge:

"On Wednesday, May 29, 2013, you and your partner, Officer Kevin

Robinson #3547, attempted to stop N [REDACTED] R [REDACTED], who was riding a motor scooter in the 2700 block of N. 6th Street. A Grand Jury investigation found that you knocked Mr. R [REDACTED] off his scooter and then hit him repeatedly with a baton and fist, causing him bodily injuries. These injuries included a [REDACTED]. The Grand Jury also found that while acting in your official capacity as a police officer, you falsified police reports, including statements to the assigned detective and Use of Force reports, in order to effectuate the arrest and criminal charges against Mr. R [REDACTED]. On 2/5/15 in the presence of Inspector Kevin Hall, #1014, Internal Affairs Division, Captain Carol Abrams #54, Internal Affairs Division, Captain Michael Cram #3, 25th District, Sergeant Robert Hennessey #510, Internal Affairs Division, Bill Davis, Attorney, Fraternal order of Police and Steve Weiler, representative, Fraternal Order of Police, you were given your Criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30-day suspension, with the intent to dismiss.” Joint Exhibit 3.

Robinson 1-§026-10 Charge:

“On Wednesday, May 29, 2013, you and your partner, Officer Sean McKnight #7574, attempted to stop N [REDACTED] R [REDACTED], who was riding a motor scooter in the 2700 block of N. 6th Street. A Grand Jury investigation found that you knocked Mr. R [REDACTED] off his scooter and then hit him repeatedly with a baton and fist, causing him bodily injuries. These injuries included a [REDACTED]. The Grand Jury also found that while acting in your official capacity as a police officer, you falsified police reports, including statements to the assigned detective and Use of Force reports, in order to effectuate the arrest and criminal charges against Mr. R [REDACTED]. On 2/5/15 in the presence of Inspector Kevin Hall, #1014, Internal Affairs Division, Captain Carol Abrams #54, Internal Affairs Division, Captain Michael Cram #3, 25th District, Sergeant Robert Hennessey #510, Internal Affairs Division, Bill Davis, Attorney, Fraternal order of Police and Steve Weiler, representative, Fraternal order of Police, you were given your Criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30-day suspension, with the intent to dismiss.” Joint Exhibit 4.

As noted earlier, a Grand Jury recommended criminal charges against both Grievants. The District Attorney prosecuted those charges. A trial jury returned no convictions on any of the charges. Of course, criminal court convictions require proof

beyond a reasonable doubt. Nevertheless, even by the lesser burden of proof applicable in labor arbitration, the record does not establish that Grievants “committed a felony or a misdemeanor which carries a potential sentence of more than (1) year, nor engaged in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses).”

Therefore, the City did not have just cause to find that Grievants violated Disciplinary Code Section 1-§026-10.

Testimony of Former ADA H [REDACTED]

At time of the incident, M [REDACTED] H [REDACTED] was a Philadelphia ADA, with the title [REDACTED], covering [REDACTED]. She left the employ of the DA’s office on August 1, 2013 (not because of this case, she testified) and is now an attorney in private practice. Former ADA H [REDACTED] was called by the City to testify at this arbitration. She testified on cross-examination that she informed the prosecuting ADA she was available and willing to testify as a witness for the prosecution at Grievants’ criminal trial. However, for reason(s) unknown to Ms. H [REDACTED], the criminal court Judge precluded her from testifying, both as a prosecution case-in-chief witness, and as a prosecution rebuttal witness.

The parties strongly disagreed regarding the admissibility of Former ADA H [REDACTED] testimony concerning her meeting with Grievants and ADA O [REDACTED] on Friday, June 21, 2013, and regarding the contents of her June 24, 2013 “Memo to File” about the meeting. The memo, though characterized by former ADA H [REDACTED] as a “Memo to File”, was addressed to her then-supervisor, ADA F [REDACTED]. The memo, with

approximately seven (7) of nine (9) lines redacted in the first paragraph, was offered as a criminal trial exhibit by the prosecution, but the Judge did not allow it into evidence. Ms. H [REDACTED] testified she does not know why the redacted memo was not admitted into evidence in the criminal court. She also did not know why the memo was redacted, testifying that usually the only information redacted is personal, sensitive or unrelated third-party names. She agreed on cross-examination that none of those redaction reasons applies to the redacted material in her memo. Under the less-strict rules of evidence in arbitration, the redacted memo was admitted into this record. Union Exhibit 1 is the redacted version of the memo. City Exhibit 7 is the unredacted version.

The redacted content recites how and why the June 21, 2013 meeting was set-up by ADA's H [REDACTED], O [REDACTED] and F [REDACTED].⁵ The Union argues the meeting itself was a setup with a pre-determined outcome, arranged in violation of Grievants' rights, under false pretenses, with abuse of the subpoena process, to trap Grievants via prosecutorial misconduct. Former ADA H [REDACTED] was permitted to testify for the City at this

⁵ The unredacted first paragraph of then-ADA H [REDACTED] June 24, 2013 "Memo to File" states, in full (*verbatim*, in italics): "*On Thursday, June 20, 2013, ADA D [REDACTED] O [REDACTED] brought to my attention that he was going to be meeting with two officers in reference to a video provided to us by defense. I called Chief ADA F [REDACTED] to see if I should accompany ADA O [REDACTED] to the meeting. After receiving instructions from ADA F [REDACTED] to sit in on the meeting, I discussed with ADA O [REDACTED] our plan. At that point, I had not reviewed the video or the discovery. ADA O [REDACTED] agreed to take the lead in the meeting. I planned to be present as an additional witness to the conversation in case any discrepancies arose later. We planned to be as casual as possible with the officers about my presence so that they would not think anything of my being there. ADA O [REDACTED] had subpoenaed both Officer Robinson and Officer McKnight to [room] 604 on Friday, June 21, 2013, under the guise of preparing them to testify in a different case. We did not want the officers to have the opportunity to prepare for the meeting in advance.*" City Exhibit 7.

arbitration about the meeting and memo, over the strenuous objection of the Union. She testified that in June of 2013 she had been an ADA for six (6) years, but was not aware of the 72 hour notice requirement before interviewing FOP Union members, and had no training in interrogating police officers. She denied that the June 21, 2013 meeting with Grievants was an ambush; she characterized it as a chance to “prevent them [Grievants] from perjuring themselves on a case I was in charge of prosecuting [i.e., R █████ criminal charges].” Former ADA H █████ also testified she was “not confident she would have gotten truthful information [from Grievants] if she just asked them to look at the video and explain.”

Therefore, based upon the above, it can only be concluded that former ADA H █████ recall as a witness at this arbitration was lacking. Despite what she testified was the “highly unusual nature” of the June 21, 2013 meeting with Grievants, and the two (2) page memo she subsequently wrote about it, former ADA H █████ testified she knew, but could not recall, the reason ADA O █████ scheduled the meeting with Grievants. She also testified she “thinks” ADA O █████ received a text message from Robinson on Sunday (June 23, 2013), rescinding Robinson’s alleged offer (allegedly made at the Friday, June 21, 2013 meeting) to go to ADA O █████’s office on Monday (June 24, 2013) to view the video. Moreover, this unsupported hearsay was not corroborated by any direct evidence or other witnesses. Rather, it was directly contradicted by Robinson’s un rebutted testimony, subject to cross-examination and the production of phone/text message records, that he never sent any such text message.

Former ADA H █████ testified it appeared to her from the video that Grievants

“ran R [REDACTED] off the road, immediately got their Asps out and immediately began wailing on him.” As discussed earlier, these factual assertions are not supported by the evidence. She was “flabbergasted” by what she saw on the video, and by how she believed it differed from Grievants’ reports of the incident. Former ADA H [REDACTED] testified she was never a police officer, never attended a police academy, was never trained in use of force (other than as an ADA), use of the Asp, or the force continuum. She agreed the video quality is poor, but maintained that she could see the officers swinging their Asps at R [REDACTED], and she could hear R [REDACTED] squealing.

Former ADA H [REDACTED] testified about the importance to her of hearing R [REDACTED] squealing on the video. She further testified that at the June 21, 2013 meeting, ADA Osborne stated to the Grievants R [REDACTED] can be heard on the video “squealing like a pig”, to which McKnight replied “People on PCP often sound that way.”⁶ Former ADA H [REDACTED] testified, firmly, “This was the first and last time hearing about PCP in this case.” However, it is undisputed McKnight stated to Det. Brooks during his interview on May 30, 2013 (the night of R [REDACTED] arrest): “It appeared to me that [R [REDACTED]] could be on something. . . . from my [past] involvement with people high on PCP or other narcotics, this male had the same actions. It seems that he wasn’t feeling any pain, screaming out of control, and not complying with police orders.” City Exhibit 1, Page 2. This Investigation Interview Record document was part of the “Discovery Packet/Package” provided by PPD to the DA’s office in conjunction with R [REDACTED]

⁶ Due to technical difficulties, the video was not shown to Grievants at the June 21, 2013 meeting.

arrest, approximately 23 days before the June 21, 2013 meeting.

Former ADA H [REDACTED] recalled in her testimony how she “read the faces” of the Grievants at the June 21, 2013 meeting when they were informed of the existence of a video of the incident. Even if taken, *arguendo*, as reliable recollections, at best this testimony is speculative as to what emotions Grievants allegedly displayed on their faces at the June 21, 2013 meeting. This testimony is unreliable and non-probative.

Former ADA H [REDACTED] memo and testimony tend to support the Union’s assertion that the June 21, 2013 meeting had a pre-determined outcome.

In light of the above, and having reviewed the entire record in-depth and at length, former ADA H [REDACTED] testimony, including her testimony regarding comments allegedly made by Grievants at the June 21, 2013 meeting, does not provide persuasive evidence of culpability of either Grievant to these charges, does not establish admission to these charges by either Grievant, and does not impact on the credibility of the testimony of either Grievant.

R [REDACTED] Civil Lawsuit / City’s Indemnification of Grievants

It is well settled that resolution of a civil lawsuit, regardless of the expenditure, is not determinative of the outcome of a criminal case, nor the outcome of a disciplinary grievance arbitration. It is undisputed that the standard for indemnification is acting within scope of employment, and the City did not disavow indemnification of Grievants in R [REDACTED] civil lawsuit. Additionally, Grievants informed the City’s civil lawsuit attorney they were each available for case preparation and to testify, but were never contacted by the City to do so.

CONCLUSION

The remainder of the City's arguments are not persuasive. Based upon all of the above, it is not necessary to discuss the remainder of the Union's arguments.

The weight of the credible and probative evidence establishes that the City met its burden to prove that discipline is warranted for each Grievant, but not to the extent necessary to uphold dismissal of either Grievant from his employment as a PPD Police Officer. Therefore, the City did not have just cause to dismiss either Grievant from his employment as a PPD Police Officer.

REMEDY

Grievants were returned to work pursuant to the Interim Award dated December 23, 2016. It left open the question of remedy, including back pay, if any, pending this Final Award. The Union argues Grievants should receive full back pay because there was no just cause to dismiss, and Grievants were completely exonerated by criminal jury trial. The City argues there should be no back pay.

The City points to the serious nature of these charges, the publicity and public perception of police brutality from the video, its reflection on the Department with the public and with the District Attorney, and the fact that Grievants were criminally charged upon Grand Jury recommendation after a thorough investigation. The City argues that prior to the criminal charges, while under investigation for such a serious incident as portrayed in the video, Grievants could not serve in the full capacity for which they were hired as Police Officers. The City argues that despite these factors, it made an accommodation it was not required to make by placing Grievants on

restricted duty. And, the City argues, once Grievants were criminally charged (and arrested), Grievants could not function at all as Police Officers, and therefore the City had no obligation to continue to employ and pay them in any status during the pendency of the criminal charges.

The Union counters that during the pendency of the criminal charges Grievants were innocent until proven guilty, and the City could have continued to keep Grievants in restricted duty status, answering phones, etc. The City, argues the Union, removed Grievants from restricted duty status and placed them in non-pay status at the City's own election, and at the City's own peril for back pay liability.

Notwithstanding the party arguments on remedy, neither side is fully persuasive. The record does not contain party agreements, rules, policies, past practice, etc., regarding duty status when under investigation and/or when criminal charges are pending. Based upon the unique facts and circumstances of this case, and pursuant to all of the foregoing opinion and discussion, Grievants are awarded back pay commencing on the date of their criminal trial acquittals, to wit: April 11, 2016, with no loss of seniority or other benefits. This back pay award is non-precedent setting and shall not be cited by either party in any other grievance, proceeding or context.

Therefore, based upon all of the above, regarding the two (2) grievances consolidated under AAA Case No. 01-15-0003-0329, the following Final Award is issued:

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FINAL AWARD

1. The City did not have just cause to dismiss Grievants Sean J. McKnight and Kevin A. Robinson.
2. Grievants were reinstated to their positions of employment with the City, subject to normal pre-hiring conditions, pursuant to Interim Award dated December 23, 2016.
3. Grievants are each awarded back pay from April 11, 2016, the date of their Philadelphia Court of Common Pleas criminal trial acquittals. Grievants shall receive such pay promptly, less any and all appropriate deductions, without incurring any loss of seniority or other benefits.
4. As requested, jurisdiction is retained for any issues arising from the implementation of this Final Award.

Dated: September 11, 2017



Robert A. Grey, Impartial Arbitrator

AFFIRMATION

I hereby affirm that I executed this instrument as my Opinion and Award.



Dated: September 11, 2017

Robert A. Grey, Impartial Arbitrator